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PERFORMANCE CLAIMS IN THE SALE OF COMPUTERS

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I. INTRODUCTION

This article compares and contrasts two similar but unfamiliar cases decided in western Massachusetts, *Westfield Chemical Corp. v. Burroughs Corp.*¹ and *Samuel Black Co. v. Burroughs Corp.*² *Westfield* and *Black* are typical of a certain genre of disputes that has developed

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1. 21 UCC Rep. Serv. 1293, [1977] 6 COMP. L. SERV. REP. 438 (Mass. Sup. Ct.). The full text of the agreements signed by the parties are set forth in 6 C.L.S.R. at 445-452. The judge was John M. Greaney, now Chief Justice of the Massachusetts Appeals Court.

2. No. 78-30777-F (D. Mass. December 18, 1981) (also a slip opinion on Lexis). The judge was Frank M. Freedman, United States District Judge, District of Massachusetts.

in recent years: the computer contract case.³ In the typical computer contract case, the plaintiff is a small business which purchases (or leases) a computer system under a written agreement and the defendant is the seller and manufacturer of the computer system.⁴ When the computer does not work as expected and the user sues, the causes of action generally sound in contract (breach of warranty) and tort (misrepresentation).

Burroughs was a defendant in these two cases and has been involved in many such cases.⁵ Burroughs, however, is certainly not the only computer vendor which has experienced this type of litigation.⁶

3. Since neither *Westfield* nor *Black* is reported in the West System, the full text of each is reprinted in APPENDIX A and APPENDIX B of this article.

4. See text accompanying note 3.

5. See, e.g., *Badger Bearing v. Burroughs Corp.*, 444 F. Supp. 919 (E.D. Wisc. 1977); *Bruffey Contracting Co. v. Burroughs Corp.*, 522 F. Supp. 769 (D. Md. 1981), *aff'd*, 681 F.2d 812 (4th Cir. 1982); *Burroughs Corp. v. Century Steel, Inc.*, 99 Nev. 464, 664 P.2d 354 (1983); *Burroughs Corp. v. Hall Affiliates*, 423 So.2d 1348 (Ala. 1982); *Burroughs Corp. v. Macon Rubber Co.*, 154 Ga. App. 322 (1980); *Carl Beasley Ford, Inc. v. Burroughs Corp.*, 361 F. Supp. 325 (E.D. Pa. 1973); *Chesapeake Petroleum Supply Co. v. Burroughs Corp.*, [1977] 6 COMP. L. SERV. REP. 768, No. 40267 (Maryland), *aff'd on other grounds*, 282 Md. 406, 384 A.2d 734 (1978); *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir. 1980); *Edwin Pearl, Inc. v. Burroughs Corp.*, 62 N.Y.2d 1031, 468 N.E.2d 700 (1984); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, No. C-84-0523-WWS (N.D. Cal., September 19, 1984); *Hi Neighbor Enterprises, Inc. v. Burroughs Corp.*, 492 F. Supp. 823 (N.D. Fla. 1980); *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974); *Iten Leasing Co. v. Burroughs Corp.*, 684 F.2d 573 (8th Cir. 1982); *Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. App. 278, 619 P.2d 1055 (1980); *Loveley v. Burroughs Corp.*, 165 Mont. 209, 527 P.2d 557 (1974); *Quad County Distributing Co., Inc. v. Burroughs Corp.*, 68 Ill. App. 3d 163 (1979); *Reimer Meat Products, Inc. v. Burroughs Corp.*, 96 Wisc. 2d 737, 293 N.W.2d 184 (1980); *Rochester Welding Supply Corp. v. Burroughs Corp.*, 78 A.D.2d 983, 433 N.Y.S.2d 888 (1980); *Sullivans of Liberty, Inc. v. Burroughs Corp.*, 57 A.D.2d 664, 393 N.Y.S.2d 626 (3rd Dept. 1977); *Sun 'n Fun Stores, Inc. v. Burroughs Corp.*, No. 79-2450-MA (D. Mass. 1982); *Suntogs of Miami, Inc. v. Burroughs Corp.*, 433 So. 2d 581 (Fla. App. 1983); *Tilden Financial Corp. v. Palo Tire Serv. v. Burroughs Corp.*, 596 F.2d 604 (3rd Cir. 1979); *U.S. Welding, Inc. v. Burroughs Corp.*, 587 F. Supp. 49 (D. Col. 1984); *Walter E. Heller & Co. v. Burroughs Corp.*, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1977); *W.R. Weaver v. Burroughs Corp.*, 580 S.W.2d 76 (Texas 1979).

6. See, e.g., *The Glovatorium, Inc. v. National Cash Register Corp.*, 684 F.2d 658 (9th Cir. 1982); *Conway Publications v. Data Gen. Corp.*, No. C82-1862A (N.D. Ga., August 17, 1983); *IBM v. Catamore*, 548 F.2d 1065 (1st Cir. 1976); *Dunn Appraisal v. Honeywell Information Sys.*, 687 F.2d 877 (6th Cir. 1982); *Accusystems, Inc. v. Honeywell Information Sys., Inc.*, 580 F. Supp. 474 (S.D.N.Y. 1984); *Computer Sys. Engineering, Inc. v. Qantel Corp.*, 571 F. Supp. 1379 (D. Mass. 1983), *aff'd*, 740 F.2d 59 (1st Cir. 1984); *Diversified Environments, Inc. v. Olivetti Corp. of Am.*, 461 F. Supp. 286 (M.D. Pa. 1978); *Teamsters Security Fund of Northern California v. Sperry Rand Corp.*, [1976] 6 COMP. L. SERV. REP. 951 (N.D. Cal.).

Both *Black* and *Westfield* are summary judgment opinions.⁷ In many of these cases, the summary judgment hearing is dispositive because the standard form agreement bars the introduction of testimonial evidence that varies or contradicts the carefully drafted language of the vendor or lessor's form agreement, leaving no issues of fact to be determined. In both *Black* and *Westfield*, Burroughs moved for summary judgment on all contract and tort issues.⁸ In both cases, the contract issues were decided in favor of the computer vendor at the summary judgment hearing.⁹ Summary judgment with respect to the tort claims, however, was granted in *Westfield*¹⁰ and denied in *Black*.¹¹ There is no indication of any subsequent proceeding in the *Westfield* case. Presumably the plaintiff did not appeal, but may have reached a settlement with Burroughs after summary judgment was granted. Before trial on the tort counts, the *Black* case was settled.

II. THE CLAIMS AND THE RULINGS

A. Westfield Chemical Corp. v. Burroughs Corp.

In *Westfield*, the plaintiff was a disgruntled purchaser of a Burroughs computer system. The action was in five counts: (1) breach of Burroughs' express warranty that the computer system would generate efficiency and time savings and was fit for plaintiff's accounting system;¹² (2) breach of contract with plaintiff to develop, maintain, and service the system;¹³ (3) breach of the implied warranty of fitness for a particular use;¹⁴ (4) negligent manufacture of the proposed system;¹⁵ and (5) fraudulent inducement.¹⁶

The court entered summary judgment for the defendant on all counts.

In disposing of counts 1 and 3, the court first noted that the defendant's standard written equipment sales contract and application software supported the contract as executed by the plaintiff and disclaimed the implied and express warranties which the plaintiff claimed

7. See *supra* note 3. Subsequent page citations to *Westfield* and *Black* will refer to APPENDIX A and APPENDIX B *infra* pages 548-570.

8. *Black*, APPENDIX B, at 554; *Westfield*, APPENDIX A at 548.

9. See *Westfield*, APPENDIX A at 553; *Black*, APPENDIX B at 554.

10. *Westfield*, APPENDIX A at 553.

11. *Black*, APPENDIX B at 569.

12. *Westfield*, APPENDIX A at 548.

13. *Id.*

14. *Id.*

15. *Id.* at 548-49.

16. *Id.* at 549.

had been breached.¹⁷ The court also found the disclaimers were conspicuous.¹⁸ Furthermore, the court concluded the standard agreement limitation of damages against the vendor was proper.¹⁹ Finally, the court ruled that the limited remedy provided under Burroughs' standard contract did not fail of its essential purpose.²⁰

With respect to count 2, the plaintiff alleged only that there had been delays in the providing of maintenance by the defendant; plaintiff did not allege that the defendant had failed to supply the quality of maintenance for which the parties had contracted. The court ruled, therefore, that Burroughs had not breached its maintenance contract which provided that it would not be liable for damages or losses in providing maintenance.²¹ The court then granted the defendant summary judgment on count 2.²²

With respect to count 4, the court ruled that the plaintiff's claim for negligent manufacture of the system was duplicative of the warranty and contract counts.²³

Finally, the court disposed of count 5, in which the plaintiff alleged it had been fraudulently induced to purchase the defendant's system. The plaintiff contended there was a statement in Burroughs' pre-sales proposal which claimed plaintiff would experience substantial man-hour savings from the system. The court held that this misrepresentation could not have been made by the sales representative with personal knowledge.²⁴ Such a statement, therefore, could not have been made with fraudulent intent.²⁵ The plaintiff, according to Judge Greaney, could not have reasonably relied on this misrepresentation.²⁶ Moreover, evidence of the misrepresentation was excluded by the entire contract clause of the parties' agreement.

B. Samuel Black Co. v. Burroughs Corp.

In *Black*, the plaintiff was a Massachusetts business trust engaged

17. *Id.*

18. *Id.*

19. *Id.* The court determined that where the loss is commercial, as in the present case, limitation of damages is not *prima facie* unconscionable, see MASS. GEN. LAWS ANN. ch. 106, § 2-719(3) (West 1958). The court then found the limitation of damages proper. *Westfield*, APPENDIX A at 549-50.

20. *Id.* at 550.

21. *Id.*

22. *Id.*

23. *Id.* at 553.

24. *Id.* at 550-52.

25. *Id.* at 551.

26. *Id.* at 552.

in the wholesale distribution of newspapers, magazines, and paperback books.²⁷ It purchased a computer system from Burroughs with which to operate this business.²⁸ The promised software, however, was never fully delivered. Black's complaint contained three counts: (1) breach of contract;²⁹ (2) knowing and willful violation of the Massachusetts Consumer Protection Act;³⁰ and (3) tortious misrepresentation.³¹ The court granted Burroughs' motion for summary judgment under count 1³² but denied the motion with respect to counts 2³³ and 3.³⁴

In its breach of contract claim, plaintiff raised two issues: (1) that defendant anticipatorily breached its contractual obligations;³⁵ and (2) that the exclusive remedies provisions of the contract between the parties did not contemplate the nature of breach present in this case and, therefore, failed of their essential purpose.³⁶ As the court noted, however, the plaintiff did not cite any instance in which the defendant made an unequivocal declaration of its intent not to perform.³⁷ Moreover, the contract as originally signed had been amended to extend the time for Burroughs to perform to a later date than the date of the initiation of the action.³⁸ Citing decisions from other courts, the *Black* court also pointed out that the defendant's standard form contracts were valid and enforceable.³⁹

With respect to count 3, the court found that the defendant had superior knowledge of the capabilities of its hardware and software products⁴⁰ and that in such a situation representations of future events may be actionable. Hence, there were sufficient material issues of fact to preclude summary judgment.⁴¹

Finally, with respect to the plaintiff's Chapter 93A claim, the court denied summary judgment and rejected the defendant's claim

27. *Black*, APPENDIX B at 554.

28. *Id.* at 555.

29. *Id.* at 556.

30. *Id.* See MASS. GEN. LAWS ANN. ch. 93A (West 1958 & Supp. 1984).

31. *Black*, APPENDIX B at 557.

32. *Id.* at 569.

33. *Id.*

34. *Id.* Note that Judge Freedman also allowed the plaintiff to add a fourth count for negligent misrepresentation. *Id.* at 554, 567-68.

35. *Id.* at 560.

36. *Id.*

37. *Id.* at 562.

38. *Id.*

39. *Id.* at 563.

40. *Id.* at 564.

41. *Id.* at 564-65.

that the action was exempt from the Consumer Protection Act.⁴²

III. CONTRACT ISSUES

Three clauses are found in practically every computer equipment sales agreement:⁴³ (1) the manufacturer warrants the equipment to be free from defects in material or workmanship for a period of time (usually less than one year); (2) the manufacturer disclaims all other warranties, express or implied, including but not limited to the implied warranties of merchantability or fitness for a particular purpose; and (3) the written agreement constitutes the entire agreement between the customer and seller with respect to the equipment and related services to be furnished, and the written agreement supersedes all prior communications between the parties, including all oral and written proposals.

The combined effect of the three clauses has been, in many cases, to eliminate almost any chance of a successful claim for breach of express or implied warranties. The first provides that the manufacturer will service any defective equipment for the period of the warranty. The second and third clauses provide that the manufacturer does not warrant the performance or capacity of the computer system. The third clause makes inadmissible any oral or written statements not within the four corners of the agreement or incorporated therein by specific reference. This so-called merger clause takes advantage of the parol evidence rule⁴⁴ to exclude sales literature or sales talk that might otherwise be found to create an express warranty. Such clauses have been held to shield computer vendors entirely from warranty liability for computer systems that do not work as expected.⁴⁵

42. *Id.* at 565-67. See also MASS. GEN. LAWS ANN. ch. 93A § 3 (West 1958 & Supp. 1984) which states:

Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States.

For the purpose of this section, the burden of proving exemptions from the provision of this chapter shall be upon the person claiming the exemptions.

Id.

43. For a discussion of computer equipment sales agreements, see Gordon & Starr, *Software Development Contracts and Consulting Arrangements: A Structure for Enforceability and Practicality*, 7 W. NEW ENG. L. REV. 487, 493-505 (1985).

44. See MASS. GEN. LAWS ANN. ch. 106, § 2-202 (West 1958 & Supp. 1984).

45. In addition to *Black* and *Westfield*, see *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir. 1980); *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974); *Bruffey Contracting Co. v. Burroughs Corp.*, 522 F. Supp. 769 (D. Md. 1981), *aff'd*, 681 F.2d 812 (4th Cir. 1982) (express warranty did not include printed circuit boards which the court classified as expendable parts).

One method of attacking these clauses is to claim that the disclaimers are unconscionable, in violation of Uniform Commercial Code section 2-302(1).⁴⁶

A. *Unconscionability*

In *Westfield*, Judge Greaney concluded that the agreement was not unconscionable because the contract was between businessmen who presumably acted at arm's length.⁴⁷ There was no indication in the opinion that the court had any evidence before it as to the commercial setting, or the purpose and effect of the agreement, on which it could consider the unconscionability of the contract. Uniform Commercial Code Section 2-302(2)⁴⁸ provides, however, that a court should afford the parties a reasonable opportunity to present such evidence when it is claimed, or appears to the court, that the contract, or any clause thereof, may be unconscionable. The existence of an issue of unconscionability has been found to preclude the granting of summary judgment.⁴⁹

In *Black*, Judge Freedman cited both *Westfield* and *Earman Oil Co., Inc. v. Burroughs Corp.*⁵⁰ for the proposition that the Burroughs standard form sales agreements were not unconscionable. There was, however, no discussion in the opinion of commercial setting, purpose, and effect.

In *Earman Oil*, Judge Brown, after discussing some of the criteria for finding unconscionability, ruled that the contract was not unconscionable. In a footnote, however, he suggested that the district court had invited counsel to present evidence concerning the question of un-

46. U.C.C. § 2-302(1) (1978) Provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id.

47. *Westfield*, APPENDIX A at 550.

48. U.C.C. § 2-302(2) (1978) provides:

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Id.

49. *Electronics Corp. of Am. v. Lear Jet Corp.*, 55 Misc. 2d 1066, 286 N.Y.S.2d 711 (1967) (citing MASS. GEN. LAWS ch. 106, § 2-302 (West 1958 & Supp. 1984)); *Reynolds v. Preferred Mutual Insurance Co.*, 49 Mass. App. Dec. 97 (1972), [1972] 11 U.C.C. REP. SERV. 701; see *Fairfield Lease Corp. v. Pratt*, 6 Conn. Cir. Ct. 537, 278 A.2d 154 (1971).

50. 625 F.2d 1291, 1299-1300 (5th Cir. 1980).

conscionability, but no such evidence was presented. Judge Brown relied on *Potomac Electric Power Company v. Westinghouse Electric Corp.*⁵¹ for the criteria by which a court will determine the existence of unconscionability. The five criteria are: (1) examination of the negotiation process as to length of time in dealing; (2) the length of time for deliberations; (3) the experience or astuteness of the parties; (4) whether counsel reviewed the contract; and (5) whether the buyer was a reluctant purchaser.⁵² Applying those criteria, Judge Brown found there was no evidence to show that the contract as executed between Earman Oil and Burroughs was unconscionable. He imposed a rebuttable presumption of arm's length dealings in commercial settings, however, saying that a standard form contract such as Burroughs', as executed by a business person in a commercial setting, is presumed to be conscionable unless proven otherwise. Judge Freedman in *Black* appears to cite *Westfield* for the proposition that the presumption is conclusive, which is inconsistent with both the Uniform Commercial Code and *Earman Oil*:

. . . I note that Black has not challenged the terms and conditions of the Burroughs standard forms on the basis of unconscionability, and the precedents cited by Burroughs suggest that such a challenge would be fruitless.⁵³

The authors suggest that if Judge Greaney in *Westfield* and Judge Freedman in *Black* had had the benefit of a full factual investigation and full briefing on the issue, the more reasoned approach by Judge Brown in *Earman Oil* would likely have emerged.

In several non-computer cases in other jurisdictions, the presumption of conscionability has been overcome.⁵⁴

The unconscionability issue was also raised in at least one prior computer contract case. In *The Glovatorium, Inc. v. National Cash Register Corp.*,⁵⁵ Judge William W. Schwarzer, in the course of a hearing on motion for judgment *non obstante veredicto* on May 1, 1981, stated:

I think this is perhaps a classic case of protecting a purchaser

51. 385 F. Supp. 572 (D.D.C. 1974), *rev'd and remanded on other grounds*, 527 F.2d 853 (D.C. Cir. 1975).

52. *Id.* at 579. See also *Earman Oil*, 625 F.2d at 1299.

53. *Black*, APPENDIX B at 560.

54. *Frank's Maintenance and Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 408 N.E.2d 403 (1980), *Industralease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*, 58 App. Div. 2d 482, 396 N.Y.S.2d 427 (1977), *Butcher v. Garrett-Enumclaw Co.*, 20 Wash. App. 361, 581 P.2d 1352 (1978).

55. No. C79-3393WWS (N.D. Cal.), *aff'd*, 684 F.2d 658 (9th Cir. 1982).

against this kind of contract, of the necessity of protecting a purchaser who is innocent of an appreciation of the consequence of a deficiency.

In the first place he relies on the reputation of NCR and its experience, its competence, the fact that it's been making computers for a long time and surely knows what it's doing and has a substantial organization to back it up. All of those things would lead a purchaser to put his trust in NCR, and certainly in this case, the purchaser was induced to do that. So . . . and induced to do so erroneously, under circumstances that support a finding of fraud, on the basis of misleading incorrect information.

But aside from that. The second branch of the—of this analysis is that a purchaser who has no experience in computers doesn't have any inkling of—how wrong these things can go, and this case is a good demonstration of what it can do to a business when it doesn't work properly, and the fact that even though you're dealing with a huge company, with enormous experience, that doesn't give you any assurance that they are going to be able to remedy the defects in their products.

So it seems to me if there is ever a reason for holding that these provisions in these contracts should not be enforced because of unconscionability, this is the a-number one case.⁵⁶

Westfield has been cited by *Black*,⁵⁷ *Earman Oil*,⁵⁸ and *W.R. Weaver v. Burroughs Corp.*⁵⁹ as authority for the proposition that Burroughs' standard form agreement has not been shown to be unconscionable. As noted above, however, Uniform Commercial Code section 2-302 provides that such a proposition is subject to a factual examination.⁶⁰ The logical result is that the issue of unconscionability, once it is raised, must be decided on a case-by-case basis. The existence of such an issue should, therefore, preclude the grant of summary judgment, unless the party alleging unconscionability is unable to present credible evidence of the commercial setting, purpose, and effect of the standard form agreement.

56. N. Cohen, 1 Computer Law Reporter 1, 149-150 (July 1982) (transcript). See also *Chesapeake Petroleum & Supply Co. v. Burroughs Corp.*, [1977] 6 COMP. L. SERV. REP., (Callaghan) 768, 769, *aff'd on other grounds*, 282 Md. 406, 384 A.2d 734 (1978) (unconscionability rendered disclaimers ineffective).

57. *Black*, APPENDIX B at 560.

58. *Earman Oil*, 625 F.2d at 1300.

59. 580 S.W.2d 76, 79 (Texas 1979).

60. See *supra* notes 46-68 and accompanying text.

B. *Limitation of Remedies*

If the disappointed computer buyer overcomes the hurdles of the disclaimers of warranty and their presumed conscionability so as to state a cause of action for breach of warranty, the next issue is whether the warranty was breached. Usually, the vendor warrants that it will repair or replace an item of equipment found defective within the warranty period.⁶¹ When a vendor cannot make the computer system work and the equipment itself is free from defects in material or workmanship, the warranty can be said to fail of its essential purpose. The limited warranty of repair or replacement of a defective piece of equipment may be no solution to the problem. In *Chatlos Systems, Inc. v. National Cash Register Corp.*,⁶² the court stated, "Because NCR never furnished four of the six promised functions, their attempted limitation of remedy failed of its essential purpose. CSI was therefore deprived of the substantial value of its bargain."⁶³

When the court reaches the conclusion that the essential purposes of the remedy failed, UCC section 2-719(2)⁶⁴ comes into play. One of the remedies otherwise available under the UCC is the recovery of consequential damages, which is exactly what the disappointed buyer is seeking.

Section 2-719(3)⁶⁵ of the Uniform Commercial Code expressly authorizes the limitation of consequential damages unless the limitation is unconscionable. Such a limitation is presumably unconscionable in consumer transactions, and presumably conscionable in commercial loss cases.⁶⁶ Pursuant to UCC section 2-714(2),⁶⁷ the buyer would be entitled to its benefit of the bargain damages (the difference, at the time and place of acceptance, between the value of the goods accepted and the value they would have had if they had been as

61. See Gordon & Starr, *supra* note 43 at 497.

62. 479 F. Supp. 738 (D.N.J. 1979), *rev'd and remanded on other grounds*, 670 F.2d 1304 (3rd Cir. 1982).

63. 479 F. Supp. at 745.

64. U.C.C. § 2-719(2) (1978) provides: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Code." *Id.*

65. U.C.C. § 2-719(3) (1978) provides: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." *Id.*

66. *Id.*

67. U.C.C. § 2-714(2) (1978) provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." *Id.*

warranted), unless special circumstances show proximate damages of a different amount.⁶⁸ Generally, the upper limit of UCC section 2-714(2) damages is the contract price plus incidental damages.⁶⁹ There are, however, situations where the benefit of the bargain could exceed the contract price.⁷⁰

In *Westfield*, the court did not address the "failure of essential purpose" issue. In *Black*, Judge Freedman acknowledged that there are cases "where a limited repair and replacement remedy essentially eviscerates a contract of its substance,"⁷¹ but held *Black* was not such a case.⁷² The time for Burroughs' performance was November 1, 1978. Black, however, cancelled the agreements in August 1978, before Burrough's performance was finally due. Black's claim of anticipatory repudiation failed. "Nevertheless, the exclusive and limited remedies of the AES [Agreement for Equipment Sale] and SSA [Software and Support Agreement] could not have failed of their essential purpose before they even became applicable."⁷³

IV. THE ISSUE OF FRAUD

A. Overview

In the typical computer system acquisition case, the computer purchaser or lessee, unless it has great economic bargaining power, will have to execute the computer vendor's standard form purchase or lease contracts. Although the purchaser or lessee may succeed in getting the vendor to amend some parts of its standard forms, the contract normally will continue to contain the standard disclaimer of warranties and limitations of liabilities provisions discussed above. In this case, as we have seen, the user's actions for breach of contract in the event of default by the vendor can be extremely limited. If the user is able to include counts for deceit or fraudulent misrepresentation by the vendor, however, it may have a greater chance that its litigation will succeed.

To survive in the competitive marketplace, a computer vendor may make many written and oral statements designed to induce the user to select its products and services. Many of these representations

68. *Id.*

69. *Id.*

70. *See Chatlos Sys., Inc. v. National Cash Register Corp.*, 670 F.2d 1304 (3rd Cir. 1982).

71. *Black*, APPENDIX B at 563.

72. *Id.*

73. *Id.*

will be made in the vendor's product literature and company brochures. If the user has enough time to analyze the various systems offered, the user may request, and the vendor may submit, a proposal which describes the vendor's system that can be designed, implemented, and installed to "meet the customer's needs." Oral statements made by salespeople and marketing analysts are another source of representations upon which a user may rely in making its decision. Consequently, vendors use the kind of protective language that appears in their standard contracts to shield themselves against unauthorized statements made by their sales representatives, or a user's mistaken interpretation of proper sales talk.⁷⁴

Under common law principles, if the user can show that any of these representations (which may include nondisclosures or omissions of certain facts) were made fraudulently, with the intent to induce the user to obtain the vendor's products and services, and that the user obtained the vendor's system relying on such misstatements to its detriment, a valid cause of action for fraud or deceit will lie.⁷⁵

B. *Westfield and Black: A Preliminary Examination*

At first glance, it may appear that the law in Massachusetts has gone in opposite directions with respect to whether a customer actually can succeed in bringing an action for fraud against a computer vendor for its misrepresentations. In *Westfield*, the plaintiff-purchaser claimed the computer vendor had made at least one misrepresentation in its written proposal given to the plaintiff before it signed the sales contract.⁷⁶ The court ruled the allegation was not a basis for a fraud action,⁷⁷ quoting from *Harris v. Delco Products, Inc.*⁷⁸ the general principle that "the law refuses to permit recovery in tort for damages resulting from reliance upon false statements of belief, of conditions to exist in the future, or of matters promissory in nature."⁷⁹ The court also noted the exception mentioned in *Harris* for statements made by a party in a "fiduciary capacity."⁸⁰

74. See R. BIGELOW, *CONTRACTING FOR COMPUTER HARDWARE, SOFTWARE, AND SERVICES*, § 4.01 et. seq. (1st ed. Matthew Bender & Co., Inc. 1985).

75. See RESTATEMENT (SECOND) OF TORTS § 525 (1977). See also W. PROSSER & W. KEETON, *TORTS*, 727-29 (5th ed. 1984).

76. *Westfield*, APPENDIX A at 551.

77. *Id.*

78. 305 Mass. 362, 25 N.E.2d 740 (1940).

79. *Id.* at 365, 25 N.E.2d at 742.

80. *Westfield*, APPENDIX A at 551. The court did not consider or discuss the possibility of a fiduciary relationship. Other plaintiffs have tried to carry this idea of the computer vendor as a fiduciary party to a higher level by alleging a separate cause of action for

Four years later in *Black*, the plaintiff-purchaser alleged that the vendor's representatives made a number of pre-sales misrepresentations regarding the vendor's abilities to produce and support a complete working computer system.⁸¹ While acknowledging the general principle quoted from *Harris* above, the court in *Black* cited two other Massachusetts cases,⁸² one decided before *Westfield*,⁸³ and one afterwards,⁸⁴ for the evolving proposition that: "'where parties to the transaction are not on equal footing but where one has or should have superior knowledge concerning the matters to which the representations relate,' representations as to future events may be actionable."⁸⁵

In *Westfield* and *Black*, we thus have two courts which considered the issue of fraudulent misrepresentations in a computer acquisition case, and reached different results. Is the law in Massachusetts still unsettled in this area? A closer reading of both cases demonstrates that this is probably not the case.

C. *Westfield: A Difficult Case*

Although it is unclear, the only alleged misrepresentation by the defendant considered by the court in *Westfield*⁸⁶ appeared in the Burroughs' pre-sale proposal to the effect that, by obtaining defendant's computer system, the plaintiff would realize a "substantial man-hour savings"⁸⁷ in its business operations. The court decided the statement was not fraudulent.⁸⁸ In reaching this decision, the court referred to defendant's affidavit that the statement in the proposal depended on a number of outside factors such as the efficiency of the plaintiff's opera-

computer professional malpractice. However, thus far these claims have met with little success. See *Rick's Furniture Distributing Co. v. Honeywell, Inc.*, No. 3-82-0770-H (N.D. Tx. September 7, 1984) and other cases cited therein.

81. *Black*, APPENDIX B at 555.

82. *Id.* at 564. Inexplicably, while citing *Westfield* earlier in its opinion for other propositions, the *Black* court made no attempt to distinguish its holding on plaintiff's count for fraudulent misrepresentation from the *Westfield* holding on the same issue.

83. *Cellucci v. Sun Oil Co.*, 2 Mass. App. Ct. 722, 320 N.E.2d 919 (1974), *aff'd*, 368 Mass. 811, 331 N.E.2d 813 (1975).

84. *Gopen v. American Supply Co.*, 10 Mass. App. Ct. 342, 407 N.E.2d 1255 (1980).

85. *Black*, APPENDIX B at 564 (quoting *Gopen v. American Supply Co.*, 10 Mass. App. 342, 345, 407 N.E.2d 1255, 1257 (1980); *Cellucci v. Sun Oil Co.*, 2 Mass. App. 722, 730, 370 N.E.2d 919, 924 (1974)).

86. The court quoted one specific representation from plaintiff's answers to interrogatories alleged to have been made by defendant's employee. *Westfield*, APPENDIX A at 551. The court did not specifically state, however, whether this was the only misrepresentation claimed by plaintiff or whether this was just an example of the type of misrepresentations that plaintiff had alleged.

87. *Westfield*, APPENDIX A at 551.

88. *Id.*

tors in operating the system, the "caliber" of electrical current supplied to the computer, and the plaintiff's anticipated volume of business to be processed.⁸⁹ Since such matters were "related to future performances [and] not susceptible of actual knowledge,"⁹⁰ there was no deceit. Furthermore, Judge Greaney ruled that since the plaintiff knew that the defendant's future performance depended on these outside factors, it could not have reasonably relied on the defendant's statements.⁹¹ In granting the defendant's motion for summary judgment with respect to the fraud count, the court cited liberally from the *Harris* case:

When a representation relates to a matter not susceptible of personal knowledge, it cannot be considered as anything more than a strong expression of opinion, notwithstanding it is made positively and as of the maker's own knowledge. The mere fact that it is stated positively cannot make it a statement of fact. The most anyone can do as to such matters is to express his opinion. It cannot be found, from the single fact that such a statement is untrue, that it was made with fraudulent intent; there must also be evidence that the maker knew it was in some respect untrue, *before there is anything to submit to the jury.*⁹²

In *Harris*, the defendant-well-digger induced the plaintiff-landowner to hire defendant to drill a well through repeated assurances that the defendant would definitely not strike salt water.⁹³ When the defendant struck salt water and not fresh water, the plaintiff sued, claiming fraud. The court rejected this claim, stating that the plaintiff had to have known at the time the statements were made that no one could tell what was below the surface of the plaintiff's land until the hole was actually dug and the water tested.⁹⁴

Regardless of whether the *Westfield* court's reliance on *Harris* was justified, one wonders whether other facts may have existed in *Westfield* that might have prevented it from being analogized to *Harris*. The opinion does not indicate that the plaintiff produced any evidence that defendant Burroughs: (1) could have reasonably predicted the probable performance level of Westfield's employees in operating the Burroughs system (given certain training they would receive from Burroughs), and (2) had inquired of, and did obtain from the plaintiff,

89. *Id.*

90. *Id.*

91. *Id.* at 552.

92. *Id.* at 551-52 (emphasis in original).

93. *Harris*, 305 Mass. at 363, 25 N.E.2d at 741.

94. *Id.* at 365, 25 N.E.2d at 742.

a reasonable estimate of the plaintiff's anticipated business growth. If so, the plaintiff might well have argued that Burroughs' man-hour savings prediction was within Burroughs' actual knowledge and, therefore, could be relied upon. That being the case, the court might not have held that *Harris* was controlling. Additionally, issues as to material fact would have been raised, and summary judgment presumably would not have been granted.⁹⁵

On the other hand, the ruling in *Westfield* may have been reached because the plaintiff simply did not have a case to support an action in deceit. In other words, the strength of the facts to be presented were not sufficient to elevate the case from one of mere sales puffing to one in which a genuine issue of fraud existed.⁹⁶ If this were true, then the ruling in *Westfield* may have been right, although for the wrong reasons. Based on the facts presented, *Westfield* may well be another illustration of the adage "hard cases make bad law."

Nevertheless, from a computer user's viewpoint, a disturbing finding in *Westfield* is the court's implication (admittedly unclear) that because the alleged misstatement made by Burroughs appeared in a pre-sales proposal and effectively disclaimed in the sales contract,⁹⁷ the plaintiff was precluded from alleging a cause of action based on tortious misrepresentation.⁹⁸ At least one other court has cited *Westfield* for this proposition, albeit in dicta.⁹⁹ But if such were the case, any claim for fraud based on statements made by a vendor during the negotiation stage could be precluded simply by having the customer sign a sales agreement with a standard integration clause.¹⁰⁰

95. See MASS. R. CIV. P. 56(c).

96. *Frye Shoe Co. v. Williams*, 312 Mass. 656, 46 N.E.2d 1 (1942).

97. *Westfield*, APPENDIX A at 551. The contract signed by the parties contained a standard integration clause. *Id.* at 548.

98. *Id.* at 552-53. Judge Greaney stated, "Other courts have held that the same Burroughs contract barred similar claims couched in the language of fraud and deceit where the claims were 'essentially' contract claims." *Id.* (citing *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.S.C. 1974)). In *Investors Premium*, however, plaintiff-purchaser based its deceit claim on defendant's misrepresentation that one computer could handle all of the plaintiff's needs. 389 F. Supp. at 42. However, instead of buying defendant's system in reliance on this misstatement, plaintiff leased a system, discovered for itself that one system would not do the job, and then purchased two systems. *Id.* at 41. The court concluded that by its own actions, plaintiff had conclusively shown that it had not relied on defendant's misrepresentation since it had bought two systems, and therefore the merger clause in the contract for those systems effectively prevented the plaintiff from raising its fraud count. *Id.* at 46.

99. See *Earman Oil Co., Inc. v. Burroughs Corp.*, 625 F.2d 1291, 1294 n.10 (5th Cir. 1980) ("We in any event feel that the misrepresentation claim is in essence a contract-related claim and thus redundant and impermissible"). *Id.*

100. Even Judge Freedman appears to be leaning in this direction early in his analy-

D. *Black: Better Facts and a Different Interpretation*

In *Black*, the basis of the plaintiff-purchaser's fraud claim involved a series of alleged misrepresentations made by the defendant Burroughs about the design, development, and capabilities of its computer system.¹⁰¹ The court acknowledged the general rule that Massachusetts law "refuses to permit recovery in tort for damage resulting from reliance upon false statements of belief, of conditions to exist in the future, or of matters promissory in nature."¹⁰² However, the court distinguished the instant case from this rule by holding that Burroughs had, or should have had, superior knowledge with respect to its own computer systems and thus to the misstatements it was alleged to have made.¹⁰³ It further explained:

As a company engaged in the sale of computer systems, Burroughs must be considered to have superior knowledge about available hardware and software and their capabilities. While it is true that the future performance of obligations under a contract is often a matter of conjecture at the time written agreements are executed, misrepresenting one's own ability to perform, that is, inducing a party to enter into a contract by claiming the present ability to perform certain obligations, may rise to the level of fraudulent misrep-

sis of plaintiff's tort claim. See *Black*, APPENDIX B at 565, stating: "the claim alleged appears to be no more than a redundant effort to recover in tort for breach of contract, for the specific misrepresentations set forth closely relate to the performance contemplated by the [sales] [a]greements" *Id.* In fairness, it could be argued that the *Westfield* court was persuaded to bar plaintiff's tort claim not so much on grounds of duplication of the contract counts, but more because Burroughs' agent's representations were part of the pre-sales proposal. See *supra* note 97 and accompanying text. Cf. *APLications, Inc. v. Hewlett-Packard Co.*, 672 F.2d 1076, 1077 (2d Cir. 1982) (buyer's reliance on defendant's misrepresentations not justified because buyer was more knowledgeable in field of computer science than defendant's agents).

101. *Black*, APPENDIX B at 564. The court recounted those alleged misrepresentations as follows:

- (a) the defendant would install a new and complete computer system (B-800) with capabilities to handle all information and processing that the plaintiff was currently undertaking, with appropriate capacity for future expansion as well as capability for "Newstand" plug-in, accounting and payables;
- (b) Software would be handled as part of the contract either by the defendant or sub-contracted by the defendant to the specifications of the plaintiff, in consultation with and to the complete satisfaction of the plaintiff;
- (c) The defendant would provide all necessary back-up and support for twelve months after the commencement of the program;
- (d) The defendant would send several of its representatives to the plaintiff's place of business prior to the execution of the subject agreements to determine the specific needs of the plaintiffs.

Id.

102. *Id.* (citing *Loughery v. Central Trust Co.*, 258 Mass. 172, 175 (1927)).

103. *Id.* at 565.

resentation actionable in tort.¹⁰⁴

Because material issues of fact existed regarding whether Burroughs had the present ability to deliver the system which it had represented to the plaintiff it could deliver, Judge Freedman denied Burrough's motion for summary judgment on the fraud action.¹⁰⁵

In reaching this decision, the court relied heavily on the *Cellucci v. Sun Oil Co.*¹⁰⁶ and *Gopen v. American Supply Co., Inc.*¹⁰⁷ cases, both decided by the Massachusetts Appeals Court. In *Cellucci*, the plaintiff-landowner wished to sell his land to an interested third party, but claimed he was induced not to sell the property by the defendant's agent's oral statements that the defendant absolutely intended to buy the land and had exclusive rights to buy it.¹⁰⁸ When the defendant ultimately refused to purchase the property, the plaintiff sued for specific performance and the defendant claimed the statute of frauds defense.¹⁰⁹ In holding the defendant should be estopped from asserting this defense, the Massachusetts Appeals Court recognized the "superior knowledge"¹¹⁰ exception to the general rule that "representations as to future events are not actionable."¹¹¹ Further clarifying matters, it added, "a prediction that Sunoco will sign a contract is not like a prediction as to the weather. It lies within the entire and exclusive control of Sunoco."¹¹²

Likewise, in *Gopen*, the Massachusetts Appeals Court found that misrepresentations regarding the future net worth of a subsidiary corporation made by an attorney representing both the parent and subsidiary to the plaintiff-lessees were actionable in fraud.¹¹³ In addition to citing the above passages from *Cellucci*, the court stated that "the extent of the assets of the corporation was a matter susceptible of actual

104. *Id.*

105. *Id.*

106. 2 Mass. App. 722, 320 N.E.2d 919 (1974), *aff'd*, 368 Mass. 811, 331 N.E.2d 813 (1975).

107. 10 Mass. App. 342, 407 N.E.2d 1255 (1980).

108. 2 Mass. App. at 725-26, 320 N.E.2d at 921-22.

109. *Id.* at 727, 320 N.E.2d at 923.

110. *Id.* at 730, 320 N.E.2d at 924.

111. *Id.* The *Cellucci* court recognized that plaintiff's signing of a purchase and sale agreement was nothing more than an offer which the defendant did not accept. *Id.* at 727, 320 N.E.2d at 923 (1974). Nevertheless, because defendant's agent misled the plaintiff into thinking the defendant would accept the offer, and the plaintiff relied on that misrepresentation to his detriment, the court held the defendant was estopped from denying acceptance of the offer.

112. *Id.* (emphasis added).

113. *Id.* 10 Mass. App. at 345-46, 407 N.E.2d at 1257.

knowledge and was not a matter of opinion.”¹¹⁴

E. *A Closer Analysis*

When read in light of the *Cellucci* and *Gopen* cases, the reasoning in *Black* appears persuasive and fair. As a developer of sophisticated computer systems, Burroughs, in making statements to Black that it intended to deliver a computer system with certain capabilities, must be viewed as one with superior knowledge¹¹⁵ and control over such predictions.¹¹⁶ In other words, Burroughs must be viewed as the party with actual knowledge of such statements.¹¹⁷ Black's allegations that such statements were fraudulently made and that it relied on these promises by Burroughs were held sufficient to have this issue presented to the jury.¹¹⁸

Although the decision in *Westfield* was made before the *Gopen* case was decided, the court's reliance on *Harris*, to the exclusion of *Cellucci*, seems misplaced. Moreover, while plaintiff's allegation of fraud in *Westfield* did not concern a statement by Burroughs regarding the operating capabilities of its system *per se* (as was true in *Black*), one can argue the statement did describe indirectly, if not directly, the performance capabilities of Burroughs' system. Although Burroughs' predictions regarding the number of man-hours Westfield would save with its system involved factors not exclusively under its control, the

114. *Id.* at 345, 407 N.E.2d 1257.

115. *Accusystems, Inc. v. Honeywell Information Sys., Inc.*, 580 F. Supp. 474, 484 (S.D.N.Y. 1984) (holding defendant liable for fraud, the court acknowledged that while plaintiff's principal had prior experience with computers, "this is a dynamically growing industry, [plaintiff's] reliance . . . was reasonable"). *Id.* But see *APLications, Inc. v. Hewlett-Packard Co.*, 501 F. Supp. 129 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1076 (2d Cir. 1982) (plaintiff was much more knowledgeable than defendant's representatives to rely on their statements and sales brochures).

116. A similar theory was espoused by Judge William W. Schwarzer in the celebrated case of *The Glovatorium, Inc. v. NCR Corp.*, No. C-79-3393-WWS (N.D. Cal. 1981). See *supra* note 56 and accompanying text.

117. See *Dunn Appraisal v. Honeywell Information Sys.*, 687 F.2d 877 (6th Cir. 1982) (affirming judgment against defendant in action alleging fraudulent misrepresentation). In *Dunn*, defendant's agents represented defendant's computer was "best suited" for plaintiff's operation and projected business expansion. In rejecting defendant's arguments that such statements were opinions about the future, the court said: "General representations that data processing equipment will be suitable for a customer's operations, based upon familiarity with both the equipment's capabilities and the customer's needs, are statements concerning present facts." *Id.* at 882.

118. See also *AccuSystems, Inc. v. Honeywell Information Sys., Inc.*, No. 80 Civ. 5710 (DDB) (S.D.N.Y. October 26, 1982) (defendant's summary judgment on plaintiff's count for fraudulent inducement denied). But see *APLications, Inc. v. Hewlett-Packard Co.*, 501 F. Supp. 129 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1076 (2d Cir. 1982).

same is true of any statement by a vendor predicting the performance of its product that is operated or used by human hands.

In today's world, predictions by computer vendors regarding the performance of their machines in selected industries are done routinely and can be very accurate, even given the factor of human intervention (which is usually incorporated into a vendor's calculations). Certainly such forecasts are not nearly as unpredictable as a weather forecast or the composition of water in a subterranean well. There can be no doubt that computer vendors intend and expect prospective users to rely on their predictions.

V. CONCLUSION

Both *Black* and *Westfield* were decided on motions for summary judgment. The difference between the two may well have been the quality of affidavits and evidence available to the plaintiff's counsel. Perhaps *Westfield* was just a hard case because it contained murky facts or facts insufficient to support the plaintiff's claim. It is unfortunate that the *Westfield* court did not discuss *Cellucci*; understandably, its applicability may not have been as apparent in 1977 as it was in 1981. With the decision in *Black*, however, many claims of deceit or fraudulent misrepresentation by a dissatisfied computer user which are based on alleged misrepresentations made by a vendor concerning its system's capabilities and/or future performance should survive a vendor's summary judgment motion.

APPENDIX A†

WESTFIELD CHEMICAL CORP. V. BURROUGHS CORP.

Massachusetts Superior Court, Hampden County, April 15, 1977
Civil Action No. 134475

GREANEY, J. This is a suit brought by Westfield Chemical Corporation against Burroughs Corporation alleging breach of contract and breach of express and implied warranties, fraud and negligence in connection with the manufacture, sale and servicing of a Burroughs computer.

On January 28, 1971 the parties entered into a written equipment sales contract,¹ a copy of which is appended to the affidavits. In that contract the seller, Burroughs Corporation, warranted that the equipment was free from defects in material and workmanship and agreed to exchange any defective equipment for a period of one year from delivery. However, the contract expressly and conspicuously disclaimed all express or implied warranties, including any for merchantability or fitness. It also provided that the entire obligation of the seller in connection with the transaction was contained in the contract.

The plaintiff alleges an express warranty by the defendant that the computer would generate efficiency and time savings and was fit for the plaintiff's account system (Declaration, Count I); an implied warranty that the system was fit for the particular use to which it was put by the plaintiff (Declaration, Count III); and a contractual agreement by the defendant to assemble, program, maintain, and service the equipment (Declaration, Count II). The plaintiff also asserts claims that are expressed in tort language, but the underlying allegations in those claims are virtually identical with the assertions contained in the

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1. On the same date, the parties also signed a separate "Application Software Support Contract." The plaintiff at times seems to claim damages caused by an alleged delay in completing the programming called for under this contract, more particularly the so-called "batch ticket program." (Declaration, Count II; Plaintiff's Answers to Interrogatories Propounded by the Defendant, Answers 4(b), (c), 13, and 14(b).)

Any such claim is barred by the provisions of that contract which also limits liability and disclaims warranties and representations. But even if these disclaimers and limitations were held ineffective in the circumstances of this case, the most that the plaintiff could recover would be its reasonable damages caused by any alleged delay in the delivery of the program. He cannot thereby acquire any rights to recover for defective machinery, maintenance or repair services covered by the other contract.

warranty counts. (Declaration, Count IV [negligence], Count V [fraudulent inducement]).

This case was heard before the court on March 23, 1977, pursuant to the defendant's motion under Mass R Civ P 56 for summary judgment. From an examination of the evidentiary material submitted, as well as the issues raised during oral argument, and the briefs, I find that there are no genuine issues of material fact in dispute and that the defendant is entitled to prevail as a matter of law.

First, I find that the disclaimer of implied and express warranties contained in the contract complies with GLc 106, §1-201(10) and is conspicuous. I also find that the disclaimer is valid and effective so as to disclaim all warranties express or implied pursuant to GLc 106, §2-316, and to therefore determine any rights that the plaintiff has to recover for claimed breach of warranties. Other courts have held that identical language in contracts of the defendant in use in other states has effectively disclaimed all express and implied warranties. *Bakal v. Burroughs Corp.*, 343 NYS2d 541, 74 Misc2d 202 [13 UCC Rep 60] (1972); *Investors Premium Corp. v. Burroughs Corp.*, Civil No. 72-1526 (DSC Feb. 1, 1974). See, GLc 106, §2-719, Official UCC Comment 3 (discussing unconscionability) ("The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316."). The *Investors Premium Corp.* decision, not a decision of record* though thoroughly in point here, is attached to defendant's brief, and covers issues germane to those present in this case.

I also find that the plaintiff and the defendant validly agreed upon a limitation of damages as governed by GLc 106, §2-719, and that the defendant is entitled to prevail as a matter of law on any claim for damages other than replacement or repair of defective parts of the computer.

The contract in issue here provides:

"Seller shall deliver, install and service the equipment as promptly as is reasonably possible, but shall not be held responsible for delay in delivery, installation or service, nor in any event under this agreement for more than an exchange of equipment under its warranty, upon return of the equipment to the seller, with seller's prior written consent. (Purchaser hereby expressly waives all damages, whether direct, incidental or consequential.)"

GLc 106, §2-719(1) specifically provides that "the agreement may . . . limit or alter the measure of damages recoverable under this Article,

* [The court is in error. The decision referred to was reported in 389 F Supp 39 as well as in 17 UCC Rep 115.—Ed.].

as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts" The purpose of this provision is to leave the parties "free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect." GLc 106, §2-719, Official UCC Comment 1.

GLc 106, §2-719(3) provides:

"Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable *but limitation of damage where the loss is commercial is not.*" (Emphasis added.)

This agreement is not unconscionable. "The principle [of unconscionability] is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." GLc 106, §2-302, Official UCC Comment 1. The majority of contracts held unconscionable have been in the area of consumer transactions. E.g., *Williams v. Walker Thomas Furniture Co.*, 350 F2d 445 [2 UCC Rep 955] (DC Cir 1965), and this contract is between businessmen acting at presumed arms length.

Nor has the limited remedy provided by this contract failed of its essential purpose. At any time the plaintiff could have returned any defective part for repair or replacement. Compare *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 NY2d 398, 244 NE2d 685, 297 NYS2d 108 [5 UCC Rep 1213] (1968) (remedy fails of its essential purpose where time for reporting defect was shorter than time reasonably necessary to discover it).

I also find that the contract makes it clear that the seller will provide maintenance coverage for twelve months at no additional cost, but shall not be liable for damages or losses in the rendering of that maintenance. Under these circumstances, the absence of any claim that the seller did not in fact offer "as well trained and competent a staff of service technicians as are available in the industry," the plaintiff cannot recover for damages allegedly caused by delays in rendering of maintenance coverage, and this entitles the defendant to judgment on Count II alleging breach of the maintenance contract.

Furthermore, I find that any alleged misrepresentation concerning the function of the computer related to future performances not susceptible of actual knowledge and cannot serve as a basis for recovery in fraud. See, *Harris v. Delco Products, Inc.*, 305 Mass 362. The plaintiff is, therefore, barred by GLc 106, §2-202 from introducing evi-

dence as to alleged representations made by the seller during the sale negotiations, particularly in view of the clause in the contract limiting the entire obligation of the parties to what appears in the written agreement. The mere characterization of representations as "fraudulent" is insufficient to take them out of the general rule that one is bound by the terms of the written agreement, whether he reads and understands it or not. See *Conney v. New England Telephone and Telegraph Co.*, 353 Mass 158.

Harris v. Delco Products, Inc., supra, in point here on the fraud claims, provides that:

"It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not a matter of opinion, estimate, or judgment, but is susceptible of exact knowledge . . . Representations, although false, concerning matters not susceptible of actual knowledge have been held to be nonactionable, at least when made by one not in a fiduciary capacity . . . and it is a general rule that the law refuses to permit recovery in tort for damages resulting from reliance upon false statements of belief, of conditions to exist in the future, or of matters promissory in nature."

This test applies as well to contract actions. *Id.*, at 364.

Any representations made by the defendant here necessarily related to the future. The plaintiff, when asked to give particulars concerning misrepresentations made by the defendant has insured in interrogatories:

"(a) One such warranty was conveyed by Burroughs proposal date 14 September 1970 signed by Richard Carlson, the substance of which was a substantial man-hour savings. The savings never materialized, and, in fact, operating time exceeded man-hours originally performed manually by Westfield Chemical Corporation." Plaintiff's Answers to Interrogatories Propounded by the Defendant, Answers 21, 14.

As is apparent from the affidavit of Julius J. Samal, appended to defendant's motion for summary judgment, man-hour savings are dependent upon such variables as the program actually decided upon, the cooperation and the efficiency of the operators, the caliber of the electrical current supplied to the computer, the volume of business being processed, etc., none of which were susceptible of knowledge when the proposal was written.

"When a representation relates to a matter not susceptible of per-

sonal knowledge, it cannot be considered as anything more than a strong expression of opinion, notwithstanding it is made positively and as of the maker's own knowledge. The mere fact that it is stated positively cannot make it a statement of fact. The most anyone can do as to such matters is to express his opinion. It cannot be found, from the single fact that such a statement is untrue, that it was made with fraudulent intent; there must also be evidence that the maker knew it was in some respect untrue, *before there is anything to submit to the jury.*" (Emphasis added.) *Harris v. Delco Products, Inc.*, *supra*, at 366 (1940).

Furthermore, as a matter of law the plaintiff could not have reasonably relied upon such representations. *Harris v. Delco Products, Inc.*, *supra*.

" . . . Regardless of what has been said about the matter, or of how strongly the statement has been put, he knows that the speaker cannot actually know what the fact of the matter is, and that, therefore, he is not justified in relying on what can, in its nature, be nothing more than the opinion, however strong, of the speaker on the matter." *Harris v. Delco Products, Inc.*, *supra*, at 367.

This is particularly true where, as here, any statements were made during the early planning stages. Compare *Yerid v. Mason*, 341 Mass 527 (1960) with *Pietrazak v. McDermott*, 341 Mass 107 (1960) (stage of completion distinguishing factor where defendants represented that cellars would be dry).

Moreover, the letter dated September 14, 1970 from Richard Carlson clearly states:

"This recommendation of Burroughs products is submitted for your consideration and guidance only in the hope that we may be favored with your order. *Since this proposal is preliminary only, the order when issued shall constitute the only legally binding commitment of the parties.*" (Emphasis added).

It should also be noted that this is not a case where the nature of the thing being sold was misrepresented, *City Dodge, Inc. v. Gardner*, 232 Ga 766, 208 SE2d 794 [15 UCC Rep 598] (1974) (dealer represented to consumer that car had never been previously owned), or the nature of the contract being signed was kept from the plaintiff. Compare *Schell v. Ford Motor Co.*, 270 F2d 384 (1st Cir 1959) (applying Massachusetts law) (consumer not barred from suing where release saying no representations had been made was characterized as a pass to enter the plant). Other courts have held that the same Burroughs contract barred similar claims couched in the language of fraud and

deceit where the claims were “essentially” contract claims. E.g., *Investors Premium Corp. v. Burroughs Corp.*, *supra*.

In summary, the breach of warranty counts fail because of the existence of a complete, conspicuous and valid disclaimer.

The breach of contract count fails because of the limitation of damage clause in the contract which is valid and enforceable and is not claimed to have been breached.

The count claiming fraud fails on the authority of *Harris v. Delco Products Inc.*, *supra*, which I find controls this claim based on the materials submitted.

Finally, the negligent manufacture count fails since it is basically a duplicate of the warranty and contract counts and hence barred by the agreement, and since nothing has been indicated factually to show any triable issue on the negligent manufacture claim.

On the basis of the foregoing, I find this to be an appropriate case for a Rule 56 motion and summary judgment to be entered for the defendant on all counts.

APPENDIX B†

SAMUEL BLACK CO. V. BURROUGHS CORP.

United States District Court, District of Massachusetts

December 18, 1981

Civil Action No. 78-30777-F

MEMORANDUM

FREEDMAN, D.J.

Defendant and third-party plaintiff Burroughs Corporation ("Burroughs") filed a motion for summary judgment "on its behalf as against plaintiff Samuel Black Company" ("Black") which was referred to a Magistrate. The Magistrate determined that genuine issues of material fact remained to be resolved and thus recommended that Burroughs' motion be denied. Burroughs seasonably objected to the Recommendation of the Magistrate. 28 U.S.C. § 636(b)(1) requires that I make a *de novo* determination of those portions of the Magistrate's Recommendation to which objection is made, and permits me to "accept, reject, or modify, in whole or part," the Recommendation of the Magistrate. *Id.*

While Burroughs' objections were pending, Black moved to amend its complaint and subsequently moved to reopen discovery for the limited purpose of filing an additional set of interrogatories and a request for production of documents. Burroughs has filed oppositions to Black's motions.

In this Memorandum, I address Burroughs' objections to the Magistrate's Recommendation and Black's motions. For the reasons stated herein, I am today entering orders modifying the Recommendation of the Magistrate by granting Burroughs' motion for summary judgment as to Count I of Black's complaint against it, but adopting the Magistrate's Recommendation of denial with respect to Counts II and III. I will also grant Black's motion to amend its complaint by adjusting the damages sought in Counts II and III and by adding a new Count IV. However, I will deny Black's motion to reopen discovery for the limited purposes requested.

II.

Plaintiff Black is a Massachusetts business trust with a principal place of business in West Springfield, Massachusetts, and is engaged,

† Reprinted verbatim from the slip opinion. All subsequent footnotes were provided by the court.

inter alia, in the wholesale distribution of newspapers, magazines, and paperback books. Lewis A. Black is a trustee of and owner of all the beneficial interest in the Black business trust. The instant litigation arises out of a computer system transaction, whereby Black agreed to purchase for substantial sums of money a sophisticated computer system from Burroughs, a Michigan Corporation with a principal place of business in that state and a regional branch office in Springfield, Massachusetts.

In early 1977, Black was actively considering whether to install an in-house computer system adaptable to its then current and future business needs. At the time, Black was utilizing a computer service bureau in Tampa, Florida, and apparently thought certain efficiencies and improvements would be achieved by changing over to an in-house system.

Among several computer systems soliciting Black's business was Burroughs, the agents of which approached Black and through an extended course of discussions and negotiations formulated a written proposal for the delivery and installation of a sophisticated computer system suitable to Black's business needs. In his affidavit, Lewis A. Black states that "Agents of the Burroughs Corporation explicitly told me . . . that Burroughs had the present capability to make operational such a [sophisticated] system . . . [and that Black] would have an operational system on or before December 1, 1977." Affidavit of Lewis A. Black, at 2. While deposition testimony of employees and former employees of Burroughs to a lesser or greater extent contradicts the fact and nature of the representations made to Black by Burroughs' agents, *see, e.g.* Deposition of Nicholas Lentino, Volume I, at 39-45, Lewis Black states in his affidavit that "Because of these representations, I, on behalf of the Samuel Black Company, executed an agreement on or about August 25, 1977, at West Springfield, Massachusetts wherein [Black] agreed to purchase the subject computer system." Affidavit of Lewis A. Black, at 2.

In fact, three written agreements were executed by the parties on August 25, 1977 ("August Agreements"). Detailed discussion of the terms and conditions of these agreements is postponed to an ensuing section.¹ It suffices to note here that all three were standard Burroughs forms, one being a Burroughs Agreement for Equipment Sale, the other two being Burroughs Software and Support Agreements. Affidavit of Francis Dibble, Esq., Appendices 1, 2, and 3. Although the parties subsequently executed additional written agreements and

1. See Part IV, A, *infra*.

made adjustments in the price of the computer hardware, *see id.*, Appendices 4, 5, 6, and 7, the August Agreements established the basic contractual relationship between the parties and provided for the sale, delivery, and installation of both computer hardware and software.

From Black's point of view, with the benefit of hindsight, the deal quickly soured. There is no dispute that the computer hardware was delivered in late December 1977, and, while there is some disagreement on this point, the hardware seemed to be in working order. There is also no dispute that the software for the Black computer system never did arrive at Black's place of business. Thus, Black never got a functioning computer system.

Little purpose would be served by attempting to present the conflicting accounts in affidavits, answers to interrogatories, and deposition testimony as to why the software was never delivered. Briefly stated, there is evidence that Burroughs intended to purchase suitable software from a Pennsylvania company, but this plan was abandoned—although it is not clear whether the plan was abandoned before or after the execution of the August Agreements. Further, there is testimony that illness prevented certain Burroughs personnel from completing the design and creation of the specific software necessary for the proper functioning of the contemplated computer system. What is clear is the fact that Burroughs prevailed upon Black to agree to extensions of time for Burroughs' performance, initially to the Spring of 1978, and thereafter to November 1, 1978. It is at this juncture, that is, when problems arose in securing suitable software, that Computer Assistance, Incorporated ("CAI"), a Connecticut Corporation with a principal place of business in West Hartford, Connecticut, became involved with the Burroughs-Black transaction.

According to answers to interrogatories filed by CAI, Burroughs in February 1978 sub-contracted the work of studying Black's software needs to CAI. Burroughs and CAI apparently reached two oral agreements; first, that CAI for payment of \$900.00 would conduct a study to determine the cost of developing a complete order processing system for the Samuel Black Company; second, for payment of \$32,000.00, CAI would develop a complete order processing system at Samuel Black Company by November 1, 1978. *See* CAI's Answers to Interrogatories of Burroughs, at 4-5. The exact date of these agreements is the subject of conflicting deposition testimony, but there seems to be no dispute that oral agreements were made.

During the Spring of 1978, Black and Burroughs executed additional equipment and software agreements. CAI began its work at

Black's place of business, but experienced some difficulty meeting deadlines because of the illness of one of its personnel. Black's increasing concern for the completion of the software grew to exasperation with the performance of Burroughs and CAI, and Black through its attorneys wrote a letter to Burroughs dated August 19, 1978, in part as follows:

You are hereby advised that effective immediately, Samuel Black Company hereby cancels any and all Agreements which it may have had with Burroughs, and shall look to Burroughs for any and all damages including loss of profits which result from Burroughs' actions in regard to said Agreements. Moreover, you are further advised that Samuel Black Company considers the misrepresentations made by agents of Burroughs with reference to the commencement of the system operation to be an unfair or deceptive practice as declared unlawful by Massachusetts General Laws, Chapter 93A in that but for the said misrepresentations, Samuel Black Company would not have entered into the subject Agreement.

Complaint, Count I, ¶ 4, and Exhibit C. Thereafter, Black made the computer hardware in its possession available to Burroughs for pick-up and the equipment was returned to Burroughs on September 28, 1978.

Black filed suit against Burroughs in state court in November 1978 alleging three counts: first, a claim for breach of contract; second, a claim for knowing and wilful violation of M.G.L. c. 93A; and third, a claim for tortious misrepresentation. Burroughs removed to this Court alleging diversity and an amount in controversy greater than \$10,000.00, *see* 28 U.S.C. § 1441(a), answered interposing several defenses, and counterclaimed against Black for amounts owing under the contracts between the parties. Burroughs subsequently filed a third-party complaint against CAI, alleging breach of contract in two counts for CAI's failure to perform the oral agreements for design differ so substantially that this Court is satisfied that there are indeed questions of material fact to be determined in this case.") While I am in agreement with the ultimate conclusion of the Magistrate with respect to Counts II and III of Black's complaint against Burroughs, my *de novo* review of the entire factual record convinces me that Burroughs is entitled to summary judgment on Count I of the complaint.

IV.

I will address the three counts of Black's complaint in light of Burroughs' motion and the undisputed factual record as follows: first,

the contract claim; second, the claim for tortious misrepresentation; and finally, the claim under Chapter 93A.

A. *Contract*

There is no genuine dispute that Black and Burroughs executed a series of written agreements, all standard Burroughs forms, the most important of which were the Agreement for Equipment Sale ("AES") and the two Software and Support Agreements ("SSA") signed by representatives of the parties on August 25, 1977. All subsequent agreements executed by the parties relate to the performance set forth in the August Agreements, and, with the exception of a letter of understanding adjusting the contract amount, are all on identical Burroughs forms.² Furthermore, there is no genuine dispute concerning the extensions of time for performance agreed to by Black, albeit reluctantly, which made Burroughs' performance due on November 1, 1978. Given these two undisputed material facts, that is, the existence of the written agreements and a subsequent agreement as to time of performance, I conclude that Burroughs is entitled to summary judgment on Black's contract claims against it.

The AES provides for the sale of a B-800 computer by Burroughs to Black for a total price of \$58,435.00 before adjustments for down payment, trade-in, and taxes. On its face, the AES states the following in large type:

Any program or software . . . supplied in conjunction with this agreement is subject to the terms and conditions set forth herein and may be contained on a software and support agreement which is incorporated by reference.

The agreement is signed by Nicholas Lentino on behalf of Burroughs, and Lewis A. Black on behalf of Black. Above Black's signature appears the following language in large type: "Customer by its signature acknowledges that it has read this agreement, understands it, and agrees to all its terms and conditions including those on the reverse side." The reverse side sets out detailed provisions in fifteen numbered clauses.

2. An AES was executed by the parties on December 23, 1977 wherein Black agreed to purchase a terminal display and keyboard for \$3,307.50. On May 1, 1978, Black purchased "Accounts Receivable Custom Programming" for \$8,000.00, and on June 13, 1978 purchased "Operator Training" for \$550.00. Both agreements are on SSA forms. A letter dated May 1, 1978 from Nicholas Lentino to Black evidences an agreement to reduce the original hardware contract price by \$8,000.00 to adjust for the increased software price of \$8,000.00. See Affidavit of Francis Dibble, Esq., at Appendices 4, 5, 6, and 7.

The SSAs executed by the parties provide for Burroughs furnishing the following software: "Accounts receivable, Invoicing, Bulk Book and History with Complete O/R Regulation, including Maintenance and Reporting Programs" for an "initial charge" of \$20,000.00 with an "Estimated Delivery Date" of January 1, 1978; and "Utilities" and "System Software" for an "initial charge" of \$540.00 and \$2,000.00 respectively, with an "Estimated Delivery Date" of December 1, 1977. On the face of these agreements appears the following in large type:

Customer acknowledges by its signature that it has read this agreement, understands it and that it constitutes the entire agreement, understanding and representations, express or implied, between the customer and Burroughs with respect to the program products and services to be furnished hereunder and that this agreement supersedes all prior communications between the parties including all oral or written proposals. This agreement may be modified or amended only by a written instrument signed by duly authorized representatives of customer and Burroughs.

The terms and conditions, including the warranty and limitation of liability, on the reverse side, are part of this agreement.

On the reverse side are fourteen numbered clauses. Both the AES and SSA forms provide that the laws of the State of Michigan shall govern the agreements. The AES in Clause 4 states in relevant part that "for a period of one year from shipment, the equipment shall be free from defects in material and workmanship under normal use and service," and that "Customer's sole and exclusive remedy in the event of defect is expressly limited to correction of the defect by adjustment, repair or replacement at Burroughs' election and sole expense" The SSA form in Clause 9 states that "Customer agrees that its sole and exclusive remedy and Burroughs' sole obligation, if a Licensed Program warranted hereunder fails to conform to the applicable design specifications and Customer advised Burroughs of such failure in writing during the term of the warranty, is for Burroughs to provide programming services to attempt to correct the defect." Both forms also set forth in type larger than that of the surrounding clauses the following terms:

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES EXPRESS OR IMPLIED INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

IN NO EVENT SHALL BURROUGHS BE LIABLE FOR LOSS

OF PROFITS, INDIRECT, SPECIAL, CONSEQUENTIAL OR OTHER SIMILAR DAMAGES ARISING OUT OF BREACH OF THIS AGREEMENT OR OBLIGATIONS UNDER THIS AGREEMENT.

BURROUGHS SHALL NOT BE LIABLE FOR ANY DAMAGES CAUSED BY DELAY IN SHIPMENT, INSTALLATION OR FURNISHING OF EQUIPMENT OR SERVICES UNDER THIS AGREEMENT.³

At the outset of analysis of the legal effect of these contract provisions, I note that Black has not challenged the terms and conditions of the Burroughs standard forms on the basis of unconscionability, and the precedents cited by Burroughs suggest that such a challenge would be fruitless. *See, e.g., Earman Oil Company, Inc. v. Burroughs Corporation*, 625 F.2d 1291, 1299-1300 (5th Cir. 1980); *Westfield Chemical Company v. Burroughs Corporation*, 21 UCC Rep. S. 1293, 1296 (Mass. Super. 1977). Neither has Black argued that the choice of law provisions of the AES and SSA do not apply to its contract claim. Instead, Black has vaguely⁴ advanced two arguments: first, that Burroughs "anticipatorily breached its contractual obligations," Plaintiff's Memorandum of Law at 2; and second, that the exclusive remedy provisions of the written agreements do not contemplate the nature of breach present in this case, and are thus ineffective. *Id.* at 5. In Black's view, genuine issues of material fact remain to be resolved concerning these issues.

Before turning these contentions, I must consider a few preliminary matters. First, the courts of Massachusetts would give effect to the choice of law provisions of the written agreements, inasmuch as Michigan, being Burroughs' state of incorporation and the location of its principal place of business, bears a reasonable relationship to the instant transaction. *Maxwell Shapiro Woolen Company v. Amerotron Corporation*, 339 Mass. 252, 257-58 (1959) (and cases cited therein); *compare*, M.G.L. c. 106 § 1-105(1) ("when a transaction bears a reasonable relationship to this state and also to another state . . . the parties may agree that the laws of either this state or of such other state . . . shall govern their rights and duties . . ."). A federal

3. The second paragraph of this clause in the SSA form is in slightly different language:

Burroughs shall not be liable for any damages caused by delay in delivery, installation or furnishing of the program product(s) and/or services under this agreement.

4. Plaintiff advances these arguments in its memorandum in conclusory terms and without any citations to authorities.

court sitting in diversity must apply the choice of law rules which the forum state would apply. *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U.S. 487, 496 (1941). Therefore, I must apply the law of Michigan in determining the validity of the instant agreements' terms and conditions and the rights and obligations of the parties thereunder.

Turning to Michigan law, I conclude that there is reason to doubt whether the courts of Michigan would treat the computer system transaction between Black and Burroughs as falling within the scope of its version of the Uniform Commercial Code's ("UCC") article on sales.⁵ See *Wells v. 10-X Manufacturing Company*, 609 F.2d 248, 255 (6th Cir. 1979). Clearly, both sales of goods and delivery of services are contemplated by the AES and SSAs and this complex transaction does not fit neatly within the language of UCC § 2-102; *but see* Note, *Computer Programs as Goods Under the UCC*, 77 Mich. L. Rev. 1149 (1979) (arguing that computer programs are analogous to phonograph records, the sale of which falls within the UCC's coverage). Resolution of the point is not critical, however; the UCC's provisions are both helpful and persuasive by analogy, and I am unaware of any advantage accruing to Black's benefit under the common law of Michigan which would alter the result in this particular case.

Both the parol evidence rule and the integration provisions of the AES and SSA forms would bar Black's introduction of evidence of any prior or contemporaneous oral agreement between the parties not reflected on the face of the signed agreements. UCC § 2-202. The language of the written agreements does not specify a date for performance, and time of performance is not made of the essence in the written agreements. Rather, the August Agreements set forth "estimated delivery dates" in December 1977 and January 1978.

When time is either not mentioned or not made of the essence in a contract, a reasonable time for performance is inferred. UCC § 2-309; *Reinforced Concrete Company v. Boyes*, 80 Mich. 609, 147 N.W. 577 (1914). What constitutes a reasonable time for performance would in most cases present a jury question, *see id.*, but in this case, the factual record indicates that the parties agreed that Burroughs' performance would be due on November 1, 1978. Clearly, no time could be more

5. The Michigan version of the UCC is codified at Mich. Comp. Laws Ann. §§ 440.1101-9994., the identity of the sections of the Official Code having been preserved by combining the Michigan Compiled Laws chapter number with the official numbers. For convenience, citations are made to the Official Code numbers.

reasonable than that agreed upon by the parties themselves in their course of dealing.

Black attempts to circumvent this point by first arguing that Burroughs "anticipatorily breached" its agreement, stating that "Black felt that the performance . . . of Burroughs would not come to pass and accordingly took the position that Burroughs had breached its agreement to Black and that consideration for any of its extensions had failed." Plaintiff's Memorandum at 5. This argument is unconvincing for two reasons. First, irrespective of what Black "felt" about the future course of performance by Burroughs and its sub-contractor CAI in July 1978, anticipatory repudiation is not implicated absent an "unequivocal declar[ation of] intent not to perform" *Jackson v. American Gas Company*, 485 F. Supp. 370, 373 (W.D. Mich. 1980) (applying Michigan law). The factual record contains no suggestion of such an "unequivocal declaration" here. Second, while I note that an agreement modifying a contract within the scope of Article II of the UCC needs no consideration to be binding, UCC § 2-209(1), the issue here is not the enforceability of or consideration given for the agreement to make Burroughs' performance due on November 1, 1978; instead, the fact that agreements were made provides a basis for determining what time for performance was reasonable under the original August Agreements. Again, the most reasonable time is that agreed to by the parties themselves during performance of their obligations under the contract.

Moreover, the warranty disclaimer provisions of the August Agreements are conspicuous, mention merchantability, and are enforceable. UCC § 2-316.⁶ While Black has characterized the exclusive remedy of repair and replacement and limitation of liability clauses of the AES and SSA forms as "boilerplate," these clauses are in accordance with the requirements of the UCC and are effective. UCC § 2-719(1).⁷ Several courts confronted with identical or very similar contract language in Burroughs forms have reached the same

6. This section provides in pertinent part:

" . . . [T]o exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in the case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by writing and conspicuous."

UCC § 2-316(2).

7. The section in its entirety provides:

(1) Subject to the provisions of subsections (2) and (3) of this section . . .
(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article [II] and may limit or alter the measure of damages recoverable under this Article . . . , and

result. *Earman Oil Company v. Burroughs Corporation*, *supra* at 1298; *Westfield Chemical Company v. Burroughs Corporation*, *supra* at 1295; *Investors Premium Corporation v. Burroughs Corporation*, 389 F. Supp. 39, 45 (D. S.C. 1974). Thus, regardless of the question of breach, the terms of the August Agreements themselves preclude the recovery sought by Black in its contract claim.

The gravamen of Black's arguments concerning these clauses, although not expressed in terms of art, is that the remedy provided for in the August Agreements fails of its essential purpose. *See* UCC § 2-719(2). However, although there no doubt are circumstances where a limited repair and replacement remedy essentially eviscerates a contract of its substance, this is not such a case. For a remedy provision to fail of its essential purpose, that provision must have been resorted to on occasion and found wanting. Here, the undisputed facts reveal that the time for Burroughs' final performance was November 1, 1978. Regardless of what rights Black may have had under UCC § 2-609 or its common law counterpart to demand adequate assurances of performance, in August 1978 the exclusive remedy provision had not yet been brought into play, much less had failed of its essential purpose. Any repair or replacement of defective software was not implicated before Burroughs had rendered final performance. Black does not dispute the fact that Burroughs, through its sub-contractor CAI, was attempting to finalize and deliver the software necessary for the Black system when Black cancelled the agreements in August 1978, although Black was and is of the view that Burroughs would not be able to complete the task by November 1, 1978. Nevertheless, the exclusive and limited remedies of the AES and SSA could not have failed of their essential purpose before they even became applicable.

Because my *de novo* review of the materials submitted persuades me that no genuine issues of material fact exist and that Burroughs is entitled to judgment as a matter of law on Count I of Black's complaint against it, I will reject the Magistrate's Recommendation in part and grant Burroughs' motion for summary judgment on Count I of the complaint.

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- (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
 - (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.
 - (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.

B. Tort

In Count III of its complaint, Black incorporates by reference the allegations of Count II, specifically referring to the following misrepresentations allegedly made by Burroughs:

- (a) the defendant would install a new and complete computer system (B-800) with capabilities to handle all information and processing that the plaintiff was currently undertaking, with appropriate capacity for future expansion as well as capability for "Newstand" plug-in, accounting and payables;
- (b) Software would be handled as part of the contract either by the defendant or sub-contracted by the defendant to the specifications of the plaintiff, in consultation with and to the complete satisfaction of the plaintiff.
- (c) The defendant would provide all necessary back-up and support for twelve months after the commencement of the program;
- (d) The defendant would send several of its representatives to the plaintiff's place of business prior to the execution of the subject agreements to determine the specific needs of the plaintiffs.

Complaint, Count II, ¶ 3.

Burroughs asserts that even indulging in all inferences favorable to the plaintiff from the factual record, Black may not recover in tort for these representations because they are promissory in nature. Black counters this argument by reference to two Massachusetts Appeals Court cases which in Black's view hold such misrepresentations actionable.

The law of Massachusetts "refuses to permit recovery in tort for damage resulting from reliance upon false statements of belief, of conditions to exist in the future, or of matters promissory in nature." *Laughery v. Central Trust Company*, 258 Mass. 172, 175 (1927) (and cases cited therein). However, recent decisions of the Massachusetts Appeals Court have tempered this broad statement of the law and have applied the now familiar rule that "where parties to the transaction are not on equal footing but where one has or should have superior knowledge concerning the matters to which the representations relate," representations as to future events may be actionable. *Gopen v. American Supply Company, Inc.*, 407 N.E.2d 1255, 1257 (Mass. App. 1980); *Cellucci v. Sun Oil Company*, 320 N.E.2d 919, 924 (Mass. App. 1974) (both cases citing Williston, *Contracts*, § 1496, at 373-74 (3d ed. 1970)).

Cellucci involved an action for specific performance of a land sale

contract on a promissory estoppel theory, and the particular misrepresentations at issue related to the legal significance of the execution of a written agreement and the likelihood of its future acceptance by a central office. 320 N.E.2d at 924-5. In *Gopen*, an attorney representing both a parent corporation and its subsidiary represented to a lessor that the subsidiary corporation would have a net worth of \$25,000.00. In reliance on this false representation, the lessor entered into a lease with the subsidiary corporation. Finding that the extent of the assets of the subsidiary "was a matter susceptible of actual knowledge and was not a matter of opinion," 407 N.E.2d 1255, the court held the representation as to future net worth actionable. *Id.*

Literally read, the allegations made by Black do not seem to bring this case within the scope of the holdings of *Cellucci* or *Gopen*. Indeed, the claim alleged appears to be no more than a redundant effort to recover in tort for breach of contract, for the specific misrepresentations set forth closely relate to the performance contemplated by the August Agreements. See, e.g., *Earman Oil Company v. Burroughs Corporation, supra*, at 1244, n.10 (and cases cited therein). On the other hand, when read in light of the evidence brought forward by Black in resisting Burroughs' motion, the allegations take on a different quality.

As a company engaged in the sale of computer systems, Burroughs must be considered to have superior knowledge about available hardware and software and their capabilities. While it is true that the future performance of obligations under a contract is often a matter of conjecture at the time written agreements are executed, misrepresenting one's own ability to perform, that is, inducing a party to enter into a contract by claiming the present ability to perform certain obligations, may rise to the level of fraudulent misrepresentation actionable in tort. Although the question is concededly close, at this juncture I am persuaded that material fact issues remain as to whether Burroughs induced Black to enter into the August Agreements by falsely representing to Black that Burroughs had the present ability to design, create, deliver, and install the sophisticated computer system sought by Black. Therefore, I will adopt the Magistrate's Recommendation and deny Burroughs' motion for summary judgment as to Count II of Black's complaint.

C. Chapter 93A

Under M.G.L. c. 93A, § 11, "Any person who engages in the conduct of any trade or commerce who suffers any loss of money or

property, real or personal . . ." as a result of an unfair method of competition or unfair and deceptive act or practice declared unlawful by M.G.L. c. 93A § 2, may recover damages therefor, including double and treble damages, attorney's fees, and costs in accordance with the provisions of § 11. M.G.L. c. 93A § 2 provides as follows:

- (a) Unfair methods of competition and unfair and deceptive acts and practices in the conduct of any trade or commerce are hereby declared unlawful.
- (b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought . . . , the courts will be guided by the interpretation given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act, as from time to time amended.
- (c) The attorney general may make rules, and regulations interpreting the provisions of subsection 2(a) of this chapter.

Id.

In its complaint, and subsequently in answers to interrogatories, Black relies on the following regulation of the Massachusetts Attorney General promulgated pursuant to M.G.L. c. 93A § 2:

An act or practice is a violation of M.G.L. c. 93A § 2 if

Any person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the prospective buyer not to enter into the transaction.

940 Code of Massachusetts Regulations ("C.M.R.") § 3.16 (1980).

Notwithstanding Burroughs' contentions that the record fails to substantiate the non-disclosure of any "fact" to Black, my review of the record convinces me that genuine issues of material fact remain with respect to the merits of Black's claim under Chapter 93A in Count III of its complaint. M.G.L. c. 93A is "a statute of broad impact which creates new substantive rights and provides new procedural devices for the enforcement those rights." *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 766, 772 (Mass. 1975), and the "statutory words '[u]nfair and deceptive practices [in M.G.L. c. 93A, § 2] are not limited by traditional tort and contract law requirements.'" *Id.* at 773 quoting *Commonwealth v. DeCotis*, 316 N.E.2d 748 (Mass. 1974). Deposition testimony submitted by Black clearly presents fact issues as to the conduct of Burroughs in the negotiation and performance of its written agreements with Black.

Burroughs has argued that it is exempt from the application of

Chapter 93A by virtue of M.G.L. c. 93A § 3(1)(b) which provides as follows:

Nothing in this chapter shall apply to . . . trade or commerce of any person of whose gross revenue at twenty percent is derived from transactions in interstate commerce, excepting however transactions which (i) occur primarily and substantially within the [C]ommonwealth [of Massachusetts]

Id. Burroughs has submitted the affidavits of two of its officers⁸ which state that over twenty percent of Burroughs' gross revenue is derived from transactions in interstate commerce, and that the computer hardware delivered to Black was manufactured in Pennsylvania. Notwithstanding these affidavits, I am in agreement with Black that at the very least a genuine issue of material fact exists as to whether the instant transaction occurred primarily and substantially within Massachusetts.⁹ Furthermore, I find Burroughs' reliance on the choice of law provisions of the AES and SSA forms as exempting it from Chapter 93A misplaced. Chapter 93A applies to the actions of contracting parties beyond the performance of the transaction's written agreements, and a standard form's choice of law provision concerning what law will govern the "interpretation, validity, and effect" of an agreement is insufficient to bar the applicability of Chapter 93A to the conduct of parties otherwise within its scope.

Therefore, I will adopt the Recommendation of the Magistrate denying Burroughs' motion for summary judgment as to Black's claims against it under Chapter 93A in Count III of the complaint.

Black has moved to amend its complaint by adding an additional Count IV for negligent misrepresentation and by increasing the amount of damages alleged in the three existing counts. Black has also moved to reopen discovery for the limited purpose of filing six additional interrogatories and a request for production of documents. Black states that its motion to amend is the result of deposition analyses. Burroughs has objected to both motions.

Once a responsive pleading has been filed, a complaint may be amended only by leave of court or with the written consent of adverse parties. F.R. Civ. P. 15(a). Leave of court is to be given freely when justice so requires, *id.*, and, as the Supreme Court has explained, absent "any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure

8. See Affidavit of Thomas E. Garvale, Controller of Burroughs Corporation; Affidavit of Jacob F. Vigil, Corporate Director of Engineering of Burroughs Corporation.

9. See Affidavit of Lewis A. Black, at 2-3.

deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’ ” *Foman v. Davis*, 371 U.S. 178, 182 (1962). While I am inclined to question why “deposition analyses” prompted a motion to amend almost three years after the filing of the complaint in this case, I cannot say that plaintiff’s motion is so tardy as to amount to “undue delay.” Furthermore, inasmuch as the allegations of the proposed Count IV closely relate to the existing counts of plaintiff’s complaint, I do not find that undue prejudice will result to the opposing party by virtue of allowance of the amendment. *See generally* 3 Moore’s Federal Practice ¶¶ 15.08, 15.10 (1980). Thus, I will allow Black to amend its complaint by adding an additional Count IV and by increasing the amount of damages sought under Counts II and III. Inasmuch as I am today allowing Burroughs’ motion for summary judgment on Count I of the complaint, Black’s motion to amend by increasing the damages sought under that count will be denied.

With respect to Black’s motion to reopen discovery, I note that the date for the close of discovery has previously been extended in this case, and that I entered an Order on November 30, 1979 extending discovery until February 20, 1980 with the specific admonition that no further extensions would be allowed. In its memorandum in support of its motion to reopen discovery, Black states the following: “without a clear showing of prejudice to the Defendant, and with the Plaintiff having demonstrated a particularized need for additional discovery, as can be perceived from the plain language of the Document Request and Interrogatories, it is urged the interest of substantial justice would be served by the discovery order being amended so as to permit the said Plaintiff to obtain the material requested in its discovery requests.” Plaintiff’s Memorandum at 4. The short answer to this argument is that substantial justice is equally well served by counsel’s timely and diligent attention to the development of a case. The substance of the matters sought to be explored in plaintiff’s proposed interrogatories and document requests is hardly new; rather, the information sought should have been the subject of plaintiff’s discovery efforts from the outset. Absent compelling circumstances, and there are none here, a motion to reopen discovery filed well over a year and a half after the close of discovery should be, and will be, denied.

CONCLUSION

With respect to Burroughs’ objections to the Magistrate’s Recom-

mentation, because I have concluded that there are no genuine issues as to any material fact and that Burroughs is entitled to judgment as a matter of law on Count I of plaintiff's complaint, I will reject the Recommendation of the Magistrate and enter summary judgment for Burroughs on Count I; however, because I find that there are genuine issues of material fact with respect to Counts II and III of Black's complaint, I will accept the Recommendation of the Magistrate denying Burroughs' motion as to these two counts. Furthermore, I will allow Black's motion to amend its complaint by adding a new Count IV and by increasing the damages sought under Counts II and III, but will deny plaintiff's motion to reopen discovery.

An appropriate order shall issue.

Frank H. Freedman

United States District Judge

ORDER

December 18, 1981

FREEDMAN, D.J.

This case came before me on the objections of defendant Burroughs Corporation to the Findings and Recommendation of a Magistrate that its motion for summary judgment be denied; and on the motion of plaintiff Samuel Black Company to amend its complaint and to reopen discovery. Having reviewed *de novo* those portions of the Magistrate's Recommendation to which objection has been made, and having considered the factual record in this case, the memoranda of counsel, and the pertinent authorities, and for the reasons set forth in the Memorandum entered this date, I have determined as follows:

- 1) That the Magistrate's Recommendation should be, and hereby is, REJECTED, with respect to Count I of plaintiff's complaint, and summary judgment should be, and hereby is, ALLOWED with respect to this count.
- 2) That the Magistrate's Recommendation should be, and hereby is, ACCEPTED with respect to Counts II and III of plaintiff's complaint, and summary judgment is DENIED as to these counts.
- 3) That plaintiff's motion to amend its complaint should be, and hereby is, ALLOWED with respect to Counts II, III, and IV.
- 4) That plaintiff's motion to amend its complaint should be, and hereby is, DENIED with respect to Count I.

- 5) That plaintiff's motion to reopen discovery should be, and hereby is, DENIED.

Summary judgment for the defendant Burroughs Corporation on Count I of the complaint of plaintiff Samuel Black Company.

It is so ORDERED.

Frank H. Freedman

United States District Court Judge